

# INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Statement .....	2
Summary of argument.....	6
Argument:	
I. THE GOVERNMENT IS NOT LIABLE UPON APPELLANT'S CLAIM CONCERNING THE RAILROAD TRACKS.....	6
II. THE GOVERNMENT IS NOT LIABLE FOR DELAY IN BEGIN- NING THE WORK .....	8
Conclusion .....	8

## STATUTES CITED

Judicial Code, sec. 242.....	1
Act of February 13, 1925, chap. 229 (43 Stat. 936).....	1



# In the Supreme Court of the United States

OCTOBER TERM, 1925

---

No. 263

UNION INSULATING & CONSTRUCTION COMPANY,  
Appellant

*v.*

THE UNITED STATES

---

*APPEAL FROM THE COURT OF CLAIMS*

---

**BRIEF FOR THE UNITED STATES**

---

## **OPINION BELOW**

The opinion of the Court of Claims (R. 45) is reported in 59 C. Cls. 582.

## **JURISDICTION**

The judgment to be reviewed was entered on April 28, 1924. (R. 47.) After a motion for a new trial was seasonably made and overruled by the court on October 20, 1924, (R. 48), an appeal was allowed on January 12, 1925 (R. 48) under Section 242 of the Judicial Code as it stood prior to the Act of February 13, 1925.

**STATEMENT**

The facts as shown by the Findings of the Court of Claims are as follows:

The appellant, an Illinois corporation, on May 28, 1920, entered into a contract with the United States to do certain construction work at Nitrate Plant No. 2 at Muscle Shoals, Alabama. (R. 40.) The appellant was to furnish certain materials which were specified in the contract (R. 40),

The U. S. of America to furnish at its present location on the reservation at U. S. Nitrate Plant No. 2, all other construction materials, the Contractor [appellant] to perform all necessary labor required in transporting such materials to the proper place for use in construction, the U. S. of America at all times to furnish the necessary right of way for ingress and egress to the place of present storage of such materials and the place of ultimate use in construction. (R. 10.)

The contract further provided (R. 9)—

Work to be Begun by June 10, 1920. Work to be Completed December 10, 1920.

In paragraph VIII of the contract it was provided that if additional time was granted to appellant to complete the contract, appellant must bear the cost of inspection and other expenses and damage to the United States, except so far as the same might arise from delays for which the United States was responsible. (R. 13.)

A schedule attached to the contract set out a list of certain materials to be furnished by the Government, and provided that (R. 15)—

The materials listed below are available for use, and must be used in the construction work covered by these specifications. The materials will be delivered by the Government to the Contractor at their present location on the reservation, and the Contractor will be held responsible for the proper care and use thereof after such delivery \* \* \*.

The specifications provided that (R. 16)—

All material furnished by the Government will be delivered F. O. B. cars, trucks or wagons on Reservation or in storage thereat. Contractor shall do necessary hauling to site of work;

and

For their hauling contractors must use only the established roadways and such temporary roadways as may be laid out for the purpose by the Officer in Charge or his agent. When it is necessary to cross curbing, bridges must be constructed in a secure manner. (R. 18.)

The contract also provided that the contractor might, at his option, use certain Government-owned equipment including two standard gauge locomotives, a locomotive crane, a steam shovel, etc., but that he should personally examine the condition of such equipment, and should furnish the necessary repairs thereto and the fuel and men for operation,

and upon completion of the work return the same to the Government in good condition. (R. 17.)

In the petition filed herein (R. 1-9) appellant made nine separate claims against the Government concerning this contract, and pressed all of such claims in the court below (R. 40-47). However, in this Court, appellant presses only two claims, namely, —Claim A in the petition, (R. 3) which is covered by Finding II, (R. 40), and claim F in the petition (R. 6) covered by Finding VII. (R. 43.)

The first claim is that the Government furnished railroad tracks from the storage yards to the place of use of materials, but failed to keep the tracks in proper condition, necessitating expenditures by appellant. (R. 3.) The court found that the right of way furnished consisted of railroad tracks running from the site of the work to the storage yards; that the tracks were used by others and were not in good condition when appellant submitted its bid, but that they were not in any worse condition when it began work. It was found further that the United States did not keep the tracks in good condition during the period of performance of the contract but turned them over to appellant for its use, together with the necessary rolling stock, and that appellant expended the sum of \$705.50 for labor in repairing the tracks, \$700.66 for repairs to equipment damaged by reason of the defective tracks, and \$1,653.49 for labor in connection with derailments. (R. 40.)

The appellant in paragraph F of its petition claimed that the Government delayed it in starting work, and should answer for the damage thereby sustained. (R. 6, 7.) The Court of Claims found that the contract provided that the work should be commenced on June 10, 1920, and that by that date appellant had its executive and office force at the plant, and was able to begin work on June 13th. The court found that the delay resulted from the inability to get material issued to the appellant and that the actual amount expended for salary and services to persons kept waiting was the sum of \$360.00; but that appellant made no complaint or protest at the time, and filed no claim until March 14, 1921. (R. 43.)

The Court of Claims determined that under the contract the Government was bound to furnish only a right of way and was not obligated to furnish railroad tracks in good repair, or to keep the same in repair; and that the Government had furnished the right of way, and thereby complied with the contract. (R. 45.)

The Court of Claims found that the delay of three days in beginning the work "resulted from the inability to get material issued to the plaintiff" (R. 43), but there is no finding that the United States was at fault in the matter, and the opinion says "nor does it satisfactorily appear that the delay was wholly caused by the Government" (R. 47).

The Court of Claims also denied appellant relief upon any of the other items of its claim, none of which appellant presses here.

#### SUMMARY OF ARGUMENT

1. The Government agreed to furnish only a right of way; it furnished that. It did not agree to furnish railroad tracks in good condition or to keep the same in repair.

2. There is no finding that the delay of three days at the beginning resulted from the fault of the United States.

#### ARGUMENT

##### I

#### THE GOVERNMENT IS NOT LIABLE UPON APPELLANT'S CLAIM CONCERNING THE RAILROAD TRACKS

The contract provided that the Government was at all times to furnish the necessary right of way for ingress or egress to the place of storage of such materials, and the place of ultimate use in the construction (R. 10); and that appellant should do all necessary hauling of materials from the site of storage to the site of work. (R. 16.)

It was further provided that appellant must use only the established roadways, or such temporary roadways as might be designated by the Government. (R. 18.) The appellant might have for use, if it desired, certain locomotives and other equipment belonging to the Government, but it was



to operate the same and keep same in repair. (R. 17.) In other words, the plain intention of the parties as expressed in the contract was that the Government would turn over to appellant certain construction materials at the storage yard on the Government reservation, and the appellant would then take the same and transport them to the site of the work and install them in such construction work. The appellant was to do all of the transporting of such materials and the construction work. It might use either for such transportation or construction the facilities then available, including the right of way and the locomotives, or it might transport such materials over any of the designated roadways in such manner as it saw fit. There was no obligation upon the appellant to use the railroad right of way instead of any other designated roadway, nor was there any obligation upon the appellant to use the locomotives or other equipment. It could take them or leave them as it saw fit. On the other hand, there was no obligation upon the Government to deliver the railroad right of way in any condition other than that in which it then existed, and certainly no obligation to keep the same in repair.

It is stretching the meaning of words to say that a "right of way" is a railroad, but it is straining still more to say that an agreement to furnish a "right of way" required the United States to furnish a railroad and keep it in repair.

The Government delivered the "right of way." It was in bad condition at the time appellant submitted its bid, but it was in no worse condition when appellant began work. The Government performed its obligation under the contract.

## II

### THE GOVERNMENT IS NOT LIABLE FOR DELAY IN BEGINNING THE WORK

The amount involved in this item is \$360. The contract provided that work should begin by June 10, 1920. The appellant had its executive staff on the works by that date and actually began work on June 13, 1920. (R. 43.) The delay of three days "resulted from the inability to get material issued to" appellant. (R. 43.) This finding does not state that the Government was at fault in the matter, and the opinion states that it did not satisfactorily appear that the delay was wholly caused by the United States.

### CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,  
*Solicitor General.*

HERMAN J. GALLOWAY,  
*Assistant Attorney General.*

APRIL, 1926.